Supreme Court, U.S.
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No. __-____

In The
Supreme Court of the United States

RICKY BELL, WARDEN,
Petitioner,

vs.

DERRICK QUINTERO,
Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

ALBERT B. CHANDLER III
Attorney General of Kentucky

RICKIE LEON PEARSON
Assistant Attorney General
Counsel Of Record
Criminal Appellate Division
Office of the Attorney General
1024 Capital Center Drive
Frankfort, KY 40601-8204
(502) 696-5342

QUESTION PRESENTED

DOES A CRIMINAL DEFENDANT'S ADMISSION OF GUILT UNDER OATH AT TRIAL PRECLUDE A HABEAS CORPUS COURT FROM CONCLUSIVELY PRESUMING PREJUDICE FOR THE PURPOSE OF EXCUSING AN OTHERWISE PROCEDURALLY DEFAULTED CLAIM AND FROM PRESUMING PREJUDICE TO SUPPORT A FINDING OF INEFFECTIVE ASSISTANCE OF COUNSEL?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, SIXTH CIRCUIT

The Attorney General of the Commonwealth of Kentucky as counsel for Petitioner Ricky Bell, Warden, Riverbend Maximum Security Institution, Nashville, Tennessee, petitions this Court for a writ of certiorari to review the Opinion of the United States Court of Appeals for the Sixth Circuit, entered in this proceeding in Case No. 99-6724 on June 29, 2001, affirming the conditional granting of the writ of habeas corpus in the United States District Court for the Western District of Kentucky.

OPINIONS BELOW

The judgment and opinion of the United States Court of Appeals for the Sixth Circuit, *Quintero v. Bell*, Case No. 99-6724, is contained in a reported Opinion, 256 F.3d 409 (6th Cir. 2001) affirming the district court's granting of a conditional writ of habeas corpus. A copy of the judgment and opinion rendered is included in a separately bound Appendix. The Appendix also includes a copy of an opinion issued by the Kentucky Supreme Court from respondent's direct appeal and a copy of an opnion issued by the Kentucky Court of Appeals from respondent's collateral

attack appeal. Neither of the state appellate court opinions are reported.

JURISDICTION

This Honorable Court's jurisdiction is invoked under Title 28 U.S.C. §1254 and pursuant to Rule 13. The United States Court of Appeals for the Sixth, on June 29, 2001, issued an opinion granting conditional federal habeas relief to a state prisoner pursuant to Title 28 U.S.C. §2254 (prior to 1996 amendment), by setting aside his first-degree escape and recidivist convictions and granting him a new trial. This petition is timely pursuant to Rule 13.

CONSTITUTIONAL PROVISIONS
SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of

the State . . . ; to be confronted with the witnesses against him; . . . and to have the Assistance of Counsel for his defense.

FOURTEENTH AMENDMENT

§1 of the Fourteenth Amendment of the Constitution of the United States states in pertinent part:

. . . nor shall any State deprive any person of life, liberty, or property, without due process of law . .

STATEMENT OF THE CASE

Petitioner, Warden Ricky Bell, seeks this extraordinary relief from the judgment and opinion of the United States Court of Appeals for the Sixth Circuit affirming the conditional granting of the writ of habeas corpus before the Honorable Thomas B. Russell, District Judge for the United States District Court for the Western District of Kentucky at Louisville. Petitioner directly appealed to the Sixth Circuit Court of Appeals. Jurisdiction was conferred by Title 28 U.S.C. §2254 (prior to 1996 amendment).

Derrick Quintero and other inmates, in June of 1988, escaped from the Kentucky State Penitentiary (a maximum

security prison) (Apx. 2). Quintero, was recaptured and tried by a jury in 1989 for second-degree escape and for

Derrick Quintero and other inmates, in June of 1988, escaped from the Kentucky State Penitentiary (a maximum security prison) (Apx. 2). Quintero, was recaptured and tried by a jury in 1989 for second-degree escape and for being a first-degree persistent felony offender. KRS 520.030; KRS 532.080. Quintero's jury included seven jurors who had previously served on a jury that had convicted one of Quintero's co-escapees (Apx. 2). The prosecutor and the defense counsel generally questioned all jurors as to whether anything they knew or had heard about the case would affect their ability to render a fair and impartial verdict. All of the jurors indicated that they could render a fair and impartial verdict (Apx. 3).

Quintero testified at trial, under oath, and confessed that he had escaped from the prison. He also attempted to establish that his escape was justified as a "choice of evils" (necessity defense) pursuant to Kentucky Revised Statute (KRS) §503.030, because he was suffering under an immediate threat of injury. However, the trial court did not instruct the jury on the affirmative defense because Quintero failed to prove an immediate threat of injury. The jury convicted Quintero of second-degree escape and for being a first-degree persistent felony offender. The jury fixed Quintero's punishment at the maximum term of

twenty (20) years of imprisonment which the trial court ordered to run consecutive with the sentence Quintero was serving when he escaped (Apx. 3).

The Kentucky Supreme Court, on direct appeal, upheld Quintero's escape and recidivist convictions on November 8, 1990 (Apx. 70-75). Thereafter, Quintero filed a collateral attack motion in the trial court and the Kentucky Court of Appeals affirmed the trial court's denial of that motion on April 4, 1997 (Apx. 65-69). The Kentucky Supreme denied Quintero's motion for discretionary review of the collateral attack appeal on August 27, 1997 (Apx. 64).

Quintero, on July 14, 1998, filed a habeas petition in the United States District Court for the Middle District of Tennessee at Nashville, Tennessee regarding his Kentucky convictions. Quintero filed the petition in Tennessee because he was and still is incarcerated on Tennessee's death row at Nashville. The federal habeas claim was transferred to the United States District Court for the Western District of Kentucky at Paducah where a Magistrate Judge, on March 10, 1999, issued a report granting a conditional writ of habeas corpus with retrial to occur within ninety (90) days (Apx. 35-63). Warden Bell filed objections to the Magistrate Judge's Report and the United States District Court for the Western District of Kentucky at Paducah on December 2, 1999, entered a Memorandum Opinion and Order granting a conditional

writ of habeas corpus requiring Kentucky to retry Quintero within ninety (90) days (Apx. 19-34).

Warden Bell, after receiving a stay of the writ, appealed to the United States Court of Appeals for the Sixth Circuit and that Court affirmed the district court's granting of the conditional writ. The Sixth Circuit issued a published opinion on June 29, 2001. *Quintero v. Bell*, 256 F.3d 409 (6th Cir. 2001) (Apx. 1-16). The Sixth Circuit held the following (Apx.13-14):

> Quintero's case merits a presumption of prejudice because the presence of the seven jurors and trial counsel's defacto acceptance of the jury composition amounted to a structural error, which we exempt from harmless error analysis. The same judge, prosecutor and defense attorney who participated in the prior trial discussed the effect of pre-trial publicity with these jurors. However, none of them--most importantly Quintero's defense attorney--acknowledged, much less expressed any concern, that seven of the jurors had previously served on a jury that had convicted Quintero's co-escapee. The presence of these jurors and the utter failure by Quintero's trial counsel to contest their presence undermined by the entire trial process, such that it lost "its character as a confrontation between adversaries." *Cronic*, 466

U.S. at 657, 104 S.Ct. 2039; *see also Arizona v. Fulminate*, 499 U.S. 279, 309, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991) (defining structural errors as those errors that affect the "entire conduct of the trial from beginning to end," as opposed to trial errors, which occur during the presentation of the case to the jury); *United States v. McFerrron*, 163 F.3d 952, 956 (6th Cir. 1998) (holding that the erroneous denial of a peremptory challenge constituted "structural error" under *Fulminate* analysis). We therefore agree with the district court's conclusion that *Cronic* applies, obviating the need for *Quintero* to demonstrate that his counsel's ineffective representation actually prejudiced him for purposes of satisfying the prejudice prong of *Strickland*.

Thus, with Quintero having satisfied the performance and prejudice prongs of *Strickland*, the district court correctly concluded that cause for the defaulted constitutional claim existed in the form of ineffective assistance of counsel. Furthermore, since the structural nature of the tainted jury error warrants a presumption of prejudice that is exempt from harmless error analysis, sufficient cause and prejudice existed for the district court to reach the merits of Quintero's procedurally defaulted Sixth Amendment claim.

REASONS FOR GRANTING THE WRIT

WHEN A DEFENDANT TESTIFIES UNDER OATH AT TRIAL AND ADMITS THAT HE COMMITTED THE CRIME, A HABEAS CORPUS COURT CANNOT PRESUME PREJUDICE TO EXCUSE AN OTHERWISE PROCEDURALLY DEFAULTED CLAIM AND ALSO PRESUME PREJUDICE TO FIND INEFFECTIVE ASSISTANCE OF COUNSEL.

A. A procedurally defaulted claim cannot be excused when the defendant testifies at trial, under oath, and confesses that he committed the crime.

A well-settled principle of habeas corpus law is that the failure of a state or federal prisoner to properly raise an issue on direct review, results in the writ being unavailable unless the prisoner establishes "cause" for the waiver and shows "actual prejudice" resulting from the alleged violation. *Reed v. Farley*, 512 U.S. 339, 354 (1994). *See also*, *Payton v. Johnson*, 97 F.3d 1452 (6th Cir. 1996) (holding that a state prisoner procedurally defaults a claim when he has not complied with an independent and adequate state procedural rule, thus causing him to lose review of his federal claim in state court). A habeas petitioner may also excuse a procedural default if he is

"actually innocent." *Schulp v. Delo*, 513 U.S. 298, 321 (1995).

The Kentucky Supreme Court, on direct appeal from Quintero's escape and recidivist convictions concluded that, "Appellants' other argument that they were prejudiced because several jurors who sat in their case had previously sat in the case of another escapee is unpreserved and will not be reviewed." (Apx.72).

The Sixth Circuit circumvented Quintero's judicial confession and its impact on the prejudice requirement to excuse a procedural default. The Sixth Circuit dealt with the judicial confession as follows (Apx. 12):

> While we agree with Bell that Quintero's admission at trial strongly undermines a finding of actual prejudice, we believe the more appropriate inquiry in this case is whether the jury composition and the lack of any objection thereto by Quintero's trial counsel constituted an error from which prejudice should be presumed."

The Sixth Circuit concluded that Quintero's case merited a presumption of prejudice because the presence of the seven jurors and trial counsel's de facto acceptance of the jury composition amounted to structural error; which is exempt from harmless error analysis (Apx. 15).

Warden Bell's position is that Quintero's judicial confession or admission under oath at trial prohibits a habeas corpus court from presuming prejudice or finding prejudice to excuse a procedural default. The finality of state procedural rules is accorded no respect if the defendant's failure to raise a claim in the state court can be excused by a habeas court presuming prejudice even though the defendant admitted at trial that he committed the crime. *See generally Coleman v. Thompson*, 501 U.S. 722. 750-751 (1991). The Sixth Circuit's analysis undermines the presumption that a criminal judgment is final. *Strickland v. Washington*, 466 U.S. at 697.

Furthermore, the jury in this case, who stated they could be impartial, is accorded the presumption that it "acted according to the law." *Strickland v. Washington*, 466 U.S. at 694. The Sixth Circuit ignored the presumption afforded juries and instead applied a presumption of prejudice or the prejudice per se approach. The Sixth Circuit's application of presumed prejudice implies that Quintero's jury could not be impartial.

A habeas petitioner, in proving the prejudice prong of the "cause and prejudice" test, must show that actual prejudice resulted from the alleged violation. *Reed v. Farley*, 512 U.S. at 354. Quintero cannot and could not show actual prejudice. The jurors who heard Quintero's case were bound to follow their oath and had no choice but to find him

guilty. There was no doubt that Quintero escaped. Consequently, prejudice should not have been presumed. Moreover, Quintero's judicial confession also means that the Sixth Circuit should have also analyzed the "cause and prejudice" test for harmless error.

B. A habeas court cannot presume prejudice to conclude that trial counsel was ineffective when the defendant testifies at trial, under oath, and confesses that he committed the crime.

This Court, in *Strickland v. Washington*, 466 U.S. 668 (1984), held that to succeed on an ineffective assistance of counsel claim, a defendant must show that "there is a real probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694.

The trial result, in this case, would not have been any different because Quintero admitted at trial that he had committed the crime. A habeas court's decision to the contrary undermines the *Strickland* test. Moreover, Quintero's judicial confession also means that the Sixth Circuit should have analyzed the *Strickland* test for harmless error. The jury, bound by its oath, had to find

Quintero guilty. Prejudice cannot be presumed under these circumstances.[1]

---

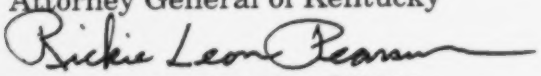
[1]The United States Court of Appeals for the Sixth Circuit, in this case and others, has applied what is called the "Cronic presumed prejudice exception". This Court in Strickland v. Washington, 466 U.S. 668, 692 (1984), created an exception in rare circumstances to the prejudice requirement for proving ineffective assistance of counsel. The exception permits prejudice to be presumed. The exception was further elaborated on in United States v. Cronic, 466 U.S. 648, 658 (1984) and this Court recognized that "[t]here are circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." Cronic, 466 U.S. at 658. The Sixth Circuit, has concluded that structural error, which is not subject to harmless error analysis, is an error that affects the "entire conduct of the trial from beginning to end." United States v. Harris, 192 F.3d 580, 588 (6th Cir. 1999). Several circuits have applied the Cronic exception sparingly and on occasion, not at all. Rickman v. Bell, 131 F.3d 1150, 1161 (6th Cir. 1997) (Suhrheinrich, J. dissenting). Thus, "[a]n overly generous reading of Cronic would do little more than replace case-by-case litigation over prejudice with case-by-case litigation over prejudice per se. Rickman v. Bell, 131 F.3d at 1164 (Suhrheinrich, J. dissenting). As a result, "[a]n unnecessarily expansive reading of the Cronic dicta frustrates other substantial interests as well; i.e., comity, federalism, and finality of judgments (Suhrheinrich, J. dissenting).

CONCLUSION

WHEREFORE, for the foregoing reasons, Petitioner, Warden Bell, respectfully prays that this Petition for Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit be granted.

Respectfully submitted,

ALBERT B. CHANDLER III
Attorney General of Kentucky



RICKIE LEON PEARSON
Assistant Attorney General
Counsel for Petitioner
1024 Capital Center Drive, Ste 200
Frankfort, Kentucky 40601-8204
Phone: (502) 696-5342
Fax: (502) 696-5533

Dated: November 15, 2001

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DERRICK QUINTERO,
Petitioner-Appellee,

v. No. 99-6724

RICKY BELL, Warden,
Respondent-Appellant.

Appeal from the United States District Court
for the Western District of Kentucky at Louisville.
No. 98-00246----Thomas B. Russell, District Judge.

Submitted: March 15, 2001

Decided and Filed: June 29, 2001

Before: KEITH, NORRIS and DAUGHTREY, Circuit Judges.

COUNSEL

ON BRIEF: Rickie L. Pearson, OFFICE OF THE ATTORNEY GENERAL, Frankfort, Kentucky, for

Appellant. Paul L. Whalen, Ft. Thomas, Kentucky, for Appellee.

OPINION

ALAN E. NORRIS, Circuit Judge, Warden Ricky Bell appeals from the district court's judgment granting a conditional writ of habeas corpus to Derrick Quintero pursuant to 28 U.S.C. § 2254. We **AFFIRM**.

I.

Quintero and other inmates escaped from the Kentucky State Penitentiary in June, 1988. In 1989, subsequent to his recapture, a jury convicted Quintero of second degree escape and first degree persistent felony offender. The jury included seven jurors who had previously served on a jury that had convicted Quintero's co-escapes.

At trial, Quintero admitted to having escaped but argued a "choice of evils" defense pursuant to Kentucky Revised Statute § 503.030, which excuses a defendant's conduct if it was necessitated by a specific and immediate threat of personal injury. However, the trial court did not instruct the jury on this affirmative defense since it concluded that Quintero had failed to offer proof of an immediate threat of personal injury. After it convicted

Quintero, the jury was instructed to sentence him to between ten and twenty years of imprisonment. The jury then sentenced Quintero to the maximum term of twenty years of imprisonment, to run consecutively with the sentence he was serving at the time of the escape.

Defense counsel did not object to the composition of the jury based on the prior involvement of the seven jurors. Although the judge, prosecutor, and defense attorney had participated in the previous trial of Quintero's co- escapees, none of them specifically questioned the seven jurors about whether their involvement in the prior trial would affect their impartiality. Instead, the prosecutor and the defense attorney generally inquired of all the jurors whether anything they knew or had heard about the case would affect their ability to render a fair and impartial verdict. All of the jurors indicated that they could render a fair and impartial verdict.

The Kentucky Supreme Court affirmed Quintero's conviction on direct appeal. With respect to Quintero's claim that he did not receive a fair and impartial jury, the Kentucky Supreme Court declined to address its merits on the ground that Quintero had failed to preserve the issue for review.

On August 16, 1995, the trial court denied Quintero's pro se motion to vacate, set aside, or correct his sentence.

The Kentucky Court of Appeals affirmed the denial; without directly addressing Quintero's contention that he did not receive an impartial jury, it noted that the Kentucky Supreme Court had refused to address the issue on direct appeal since it was not preserved. Quintero then filed a motion for discretionary review, which the Kentucky Supreme Court rejected.

Quintero filed his petition seeking a writ of habeas corpus. Based on its conclusion that Quintero's Sixth Amendment right to an impartial jury was violated, the district court granted a conditional writ of habeas corpus requiring a new trial. Though Quintero had procedurally defaulted his Sixth Amendment impartial jury claim, the district court determined that he had received ineffective assistance of counsel; that sufficient cause and prejudice for the default therefore existed; and that it could reach the merits of his claim.

II.

A. *Standard of Review*

We review a district court's legal conclusions in a habeas proceeding de novo and its factual findings for clear error. *Lucas v. O'Dea*, 179 F.3d 412, 416 (6th Cir.1999). Because Quintero filed his habeas petition on July 14, 1998, the standards set forth in the Antiterrorism and Effective Death Penalty Act of 1996 govern review of the state court's

decision. See *Lindh v. Murphy*, 521 U.S. 320, 336, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997); *Harpster v. Ohio*, 128 F.3d 322, 326 (6th Cir.1997). As amended, 28 U.S.C. § 2254(d) provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court unless the adjudication of the claim-
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based upon an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

With respect to the district court's finding that Quintero received ineffective assistance of trial counsel, we review de novo the performance and prejudice prongs of the

test announced in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *Sims v. Livesay*, 970 F.2d 1575, 1579 (6th Cir.1992) (citing *Strickland*, 466 U.S. at 698, 104 S.Ct. 2052).

B. *Sixth Amendment Violation* [1]

Criminal defendants have a Sixth Amendment right to be tried by impartial and unbiased jurors. *United States v. Frost*, 125 F.3d 346, 379 (6th Cir.1997) (citing *Ross v. Oklahoma*, 487 U.S. 81, 85, 108 S.Ct. 2273, 101 L.Ed.2d 80 (1988)). In evaluating whether Quintero's right to an impartial jury was violated, we note that the parties do not cite to, nor can we find, any federal cases where members of a jury served in a prior trial of a co-conspirator. However, a case from the Tenth Circuit is instructive.

In *United States v. Gillis*, 942 F.2d 707, 710 (10th Cir.1991), the Court of Appeals reversed a conviction where members of the jury had sat on a voir dire panel from an

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[1]We first address the merits of Quintero's constitutional claim, even though the threshold issue is whether the district court properly reached the merits of the claim. A discussion of the merits illuminates the issue of prejudice, an element that Quintero must demonstrate for us to consider his procedurally defaulted claim. *See Reed v. Farley*, 512 U.S. 339, 354, (1994) (requiring the cause for, and prejudice resulting from, a procedurally defaulted claim be demonstrated before the merits of the claim may be addressed).

earlier case in which the same defendant was tried on different charges. Id. at 710. The Tenth Circuit found a significant risk that the jury was biased due to some of the jurors' exposure to voir dire questions in the earlier case. Id. According to the court, "[p]otential jurors present at both voir dire examinations could easily have been influenced by the prior questioning such that they would not be 'willing to decide the case solely on the evidence before' them." Id. (quoting *Smith v. Phillips*, 455 U.S. 209, 217, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982)). Although *Gillis* involved two trials of the same defendant, we believe that the logic of that decision applies with equal force to Quintero's trial before seven jurors who had previously convicted his co-escapees. See *United States v. Maliszewski*, 161 F.3d 992, 1004 (6th Cir.1998) (observing that a defendant is prejudiced where a court informs a jury that indicted co-defendants have pleaded guilty).

We thus agree with the district court's conclusion that Quintero's Sixth Amendment right to an impartial jury was violated. If a juror's mere exposure to a prior voir dire prejudices a defendant, then the circumstances of Quintero's trial certainly violate the Sixth Amendment since seven of the jurors who convicted him had served on a jury two months earlier and had determined beyond a reasonable doubt that his co-escapees were guilty of the same offense.

Bell argues that the district court applied case law that post-dates Quintero's conviction, and thus inappropriately applied constitutional principles of law that did not exist when the conviction became final. See *Teague v. Lane*, 489 U.S. 288, 310, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989)("[N]ew constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced."). However, the principle of presuming prejudice in extreme cases of jury bias predates Quintero's 1989 conviction. See, e.g., *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 556-57, 104 S.Ct. 845, 78 L.Ed.2d 663 (1984) (Blackmun, J., concurring) (acknowledging the possibility of facts from which "bias is to be inferred"); *Remmer v. United States*, 347 U.S. 227, 229, 74 S.Ct. 450, 98 L.Ed. 654 (1954) (noting that in criminal cases, "any private communication, contact, or tampering, directly or indirectly, with a juror about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial"). Moreover, the district court did not rely on recent cases, such as *Gillis* or *Frost*, to announce a new controlling rule; instead, as in our own analysis, the district court's discussion of these cases was simply part of its reasoning by analogy to determine that the facts of this case warranted a conclusion that Quintero's Sixth Amendment right to be tried by an impartial jury was violated.

Finally, the jurors' attestation of their impartiality does not, under the circumstances of this case, overcome a presumption of bias. After being questioned by the prosecutor and the defense attorney regarding their general exposure to the case, every juror indicated that he or she could render a fair and impartial verdict. However, although the judge, prosecutor, and defense attorney had participated in the trial of Quintero's co-escapees, none of them questioned the seven jurors about their involvement in that trial. Such a catch-all colloquy was inadequate to wipe away the taint of bias which attached to a jury that included seven members who had previously determined beyond a reasonable doubt that the others who escaped were guilty. Under these circumstances, bias must be presumed.

C. *Procedural Default*

We now turn to whether the district court appropriately reached the merits of the procedurally defaulted claim.[2] A federal court may not reach the merits of a procedurally defaulted constitutional claim unless the

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[2]The parties do not dispute that Quintero's counsel, by failing to object to the impaneling of the seven jurors who had previously served on the jury that convicted Quintero's co-escapees, procedurally defaulted Quintero's Sixth Amendment claim that he was denied an impartial jury. *See Gilbert v. Park*, 763 F.2d 821, 824 (6th Cir. 1985).

petitioner demonstrates both that there was cause for the default and that the constitutional violation prejudiced him. *Reed v. Farley*, 512 U.S. 339, 354, 114 S.Ct. 2291, 129 L.Ed.2d 277 (1994). In reaching the merits of Quintero's constitutional claim, the district court determined that he had established cause and prejudice for the procedurally defaulted claim based on ineffective assistance of trial counsel.[3]

Counsel's performance at trial is constitutionally ineffective when his or her representation is both objectively unreasonable and prejudicial to the defendant. See *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

The district court determined that Quintero's counsel failed the performance prong of *Strickland*:

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[3]There are two prejudice inquiries at issue in this case. First, there is the prejudice *resulting from the tainted jury*, which Quintero must demonstrate (along with cause) to reach the procedurally defaulted tainted jury claim. Second, within the "cause" inquiry for reaching the procedurally defaulted tainted jury claim is an inquiry regarding the prejudice *resulting from ineffective assistance of counsel*. Since the two prejudice inquiries are so closely linked in this case, we discuss them together. Quintero's admission of escape also suggests that harmless error analysis should apply. However, for reasons discussed *infra*, we conclude that the jury was so tainted as to constitute structural error. Structural errors are, of course, exempt from harmless error analysis.

> While counsel conducted a thorough voir dire regarding what the potential jurors knew of the case based on pre-trial publicity, the voir dire stopped short of revealing that several potential jurors had served on the jury of Petitioner's co-escapees a few months prior. Given that Petitioner's counsel represented the co-escapees in the earlier trial, he should have been aware of the potential that some of the same jurors would be on Petitioner's voir dire panel.

(Dist. Ct. Op., Dec. 2, 1999, at 7.) With respect to the prejudice prong of *Strickland*, the district court presumed prejudice, holding that Quintero did not have to show actual prejudice based on an exception set forth in *United States v. Cronic*, 466 U.S. 648, 658, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984)(stating that "[t]here are ... circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified").

The parties do not dispute the district court's finding that Quintero satisfies the performance prong of *Strickland*. However, Bell asserts that the district court, in its effort to reach the merits of Quintero's procedurally defaulted claim, erroneously concluded that Quintero satisfied the prejudice prong of *Strickland*. Bell argues that the district court should have followed the Kentucky Court of Appeals, which, in affirming the denial of Quintero's motion to vacate his

sentence, held that Quintero could not show prejudice because he had confessed under oath that he was guilty of escape.

While we agree with Bell that Quintero's admission at trial strongly undermines a finding of actual prejudice, we believe the more appropriate inquiry in this case is whether the jury composition and the lack of any objection thereto by Quintero's trial counsel constituted an error from which prejudice should be presumed.

The *Strickland* Court acknowledged the need to presume prejudice in certain situations:

> In certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice. So are various kinds of state interference with counsel's assistance. Prejudice in these circumstances is so likely that case by case inquiry into prejudice is not worth the cost. Moreover, such circumstances involve impairments of the Sixth Amendment right that are easy to identify and, for that reason and because the prosecution is directly responsible, easy for the government to prevent.

Strickland, 466 U.S. at 692, 104 S.Ct. 2052 (citations omitted). Cronic, the companion case to *Strickland*, also

discusses contexts where prejudice is to be presumed:

> [t]here are ... circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.... [In these circumstances,] the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial.

Cronic, 466 U.S. at 658, 659-60, 104 S.Ct. 2039. In *Rickman v. Bell*, 131 F.3d 1150 (6th Cir.1997), we applied the *Cronic* exception to excuse a death row petitioner's need to show actual prejudice where his counsel openly displayed contempt for him, effectively providing the petitioner "not with defense counsel, but with a second prosecutor." Id. at 1157. In deciding whether *Cronic* applied, we noted that the fundamental question "is whether the trial 'process [has lost] its character as a confrontation between adversaries'; if so, then 'the constitutional guarantee is violated.' And then, it is not necessary to demonstrate actual prejudice." Id. at 1155 (quoting *Cronic*, 466 U.S. at 656-57, 104 S.Ct. 2039).

Quintero's case merits a presumption of prejudice because the presence of the seven jurors and trial counsel's de facto acceptance of the jury composition amounted to a

structural error, which we exempt from harmless error analysis. The same judge, prosecutor and defense attorney who participated in the prior trial discussed the effect of pre-trial publicity with these jurors. However, none of them--most importantly Quintero's defense attorney--acknowledged, much less expressed any concern, that seven of the jurors had previously served on a jury that had convicted Quintero's co-escapees. The presence of these jurors and the utter failure by Quintero's trial counsel to contest their presence undermined the entire trial process, such that it lost "its character as a confrontation between adversaries." *Cronic*, 466 U.S. at 657, 104 S.Ct. 2039; *see also Arizona v. Fulminante*, 499 U.S. 279, 309, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991) (defining structural errors as those errors that affect the "entire conduct of the trial from beginning to end," as opposed to trial errors, which occur during the presentation of the case to the jury); *United States v. McFerron*, 163 F.3d 952, 956 (6th Cir.1998) (holding that the erroneous denial of a peremptory challenge constituted "structural error" under the *Fulminante* analysis). We therefore agree with the district court's conclusion that *Cronic* applies, obviating the need for *Quintero* to demonstrate that his counsel's ineffective representation actually prejudiced him for purposes of satisfying the prejudice prong of *Strickland*.

Thus, with Quintero having satisfied the performance and prejudice prongs of *Strickland*, the district court

correctly concluded that cause for the defaulted constitutional claim existed in the form of ineffective assistance of counsel. Furthermore, since the structural nature of the tainted jury error warrants a presumption of prejudice that is exempt from harmless error analysis, sufficient cause and prejudice existed for the district court to reach the merits of Quintero's procedurally defaulted Sixth Amendment claim.

D. *Scope of Limited Writ*

Bell asserts that if a conditional writ of habeas corpus is proper, it should only result in a new sentencing hearing, as opposed to the district court's mandate that Quintero receive a new trial to determine the question of his guilt or innocence. Bell bases his assertion on his interpretation of the district court's opinion, whose discussion of prejudice, Bell opines, concerns only the sentence imposed on Quintero by the jury.

However, as is the case with all structural errors, the tainted composition of Quintero's trial undermined Quintero's entire trial. The only appropriate remedy is to grant Quintero a new trial.

III.

For the foregoing reasons, the district court's grant of a conditional writ of habeas corpus is **AFFIRMED**.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 99-6724

DERRICK QUINTERO,
Petitioner - Appellee,

v.

RICKY BELL, Warden
Respondent - Appellant,

Before: KEITH, NORRIS, and DAUGHTREY, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Western District of Kentucky at Louisville.

THIS CAUSE was heard on the record from the district court and was submitted on briefs without oral argument.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court granting a conditional writ of habeas corpus to petitioner Derrick Quintero pursuant to 28 U.S.C. § 2254 is AFFIRMED.

ENTERED BY ORDER OF THIS COURT

s/ Leonard Green

Leonard Green, Clerk

FILED
June 29, 2001
Leonard Green, Clerk

Western District of Kentucky
FILED
December 2, 1999
at Paducah
Jeffrey Epperson
Clerk: U.S. District Court

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION
CIVIL ACTION NO. 5:98CV246(R)

DERRICK QUINTERO PETITIONER

vs.

RICKY BELL, Warden
RESPONDENT

MEMORANDUM OPINION & ORDER

This matter is before the Court on Respondent's motion to dismiss or for summary judgment. Upon consideration of the Magistrate Judge's Report and the objections thereto, the motion is DENIED, and a CONDITIONAL WRIT of HABEAS CORPUS is GRANTED.

I. FACTS AND CLAIMS

Petitioner was tried in 1988 in the Lyon Circuit Court for escape from the Kentucky State Penitentiary ("KSP"). He was convicted of second degree escape and first degree persistent felony offender. The jury was instructed to sentence him to between ten and twenty years. The jury recommended, and he was sentenced to, twenty years

imprisonment, to run consecutively with the sentence he were serving at the time of the escape. Petitioner is now on death-row in a Tennessee state prison for crimes committed while a fugitive from KSP.

Petitioner's only defense at trial was a "choice of evils" defense pursuant to K.R.S. 503.030. This defense requires that the defendant's conduct be necessitated by a specific and immediate threat of injury to his person. On direct appellate review, the Kentucky Supreme Court held that the jury instruction for this affirmative defense was properly denied because Petitioner offered no proof of immediate threat. (Record of Trial, TR 75 (citing *Senay v. Commonwealth*, 650 S.W.2d 259 (Ky. 1983)). The trial court determined that petitioner had failed to meet his burden of proof for this defense, and did not submit the instruction to the jury. The failure to give the instruction for his affirmative defense is not an issue for this petition.

Petitioner filed this habeas corpus petitioner pursuant to 28 U.S.C. § 2254 asserting several claims. The Magistrate Judge recommended granting a conditional writ of habeas corpus requiring a new trial because seven members of petitioner's jury had previously served on the jury of co-escapees who had been found guilty of escape two months prior to Petitioner's trial. The Magistrate Judge recommended that the remainder of the Petition be denied.

There is no indication in the record that the jurors in question informed anyone that they were on the previous jury, however, the same judge, prosecutor and defense attorney had participated in the previous trial.

During voir-dire, the jurors were asked by the prosecutor:

> Disregarding what you know personally about the case, what you've heard about the case, what you've read about the case, what you've seen about the case, would each of you be able to listen solely to the evidence that will emanate from this jury — from this witness stand, and based upon what you've heard, and not what you know, based solely on what you hear and what's introduced as evidence, would you be allowed to render a fair and impartial verdict.

State Transcript of Evidence at 26.

The voir dire was also questioned by the defense attorney:

> Of course, I believe all of you raised your hand and said that you had heard something about it, and I agree with [the prosecutor]. Just the fact that you heard something about it would not interfere with your ability to be a juror in this case. However, I know

> experience tells me and I'm sure you all also that there are different degrees of knowing about something. You know, sometimes you can just hear something in passing, and it's not — doesn't make much difference to you, you don't pay much attention, may not even remember it much later on. Other things you heard may just stick with you, and certainly in this day and time with newspaper accounts, radio broadcasts, television accounts, people talking out in the public, you know, sometimes you can begin to make up your mind about how a certain thing happened or who was involved or who's guilty or who's not guilty, what happened and what didn't happen, and it's important whether or not that's happened, I think. Is there anybody here who feels that they because of everything they've heard and seen and read or talked about in the community and such feel that they've made their mind up as to whether these young men over here are guilty or not of this crime.

Id. at 29-30.

All of the jurors who served on Petitioner's jury affirmed that they could render a fair and impartial verdict.

In its objections to the Magistrate Judge's report, the Commonwealth argues that the petition should be dismissed because Kentucky law does not prohibit trial by

the same jury was previously tried coconspirators. The Commonwealth does not directly address the constitutional issues.

II. CONSTITUTIONAL VIOLATION

The Sixth Amendment guarantees a criminal defendant the right to be tried by impartial and unbiased jurors. *U.S. v. Frost*, 125 F.3d 346, 379 (6th Cir. 1997)(citing *Ross v. Oklahoma*, 487 U.S. 81, 85, 108 S.Ct. 2273, 2276-77, 101 L.Ed.2d 80 (1988)). The parties do not cite to, nor can the Court find, any federal cases where members of a jury sat on a prior trial of a co-conspirator. The Tenth Circuit has reversed a federal defendant's conviction where members of the jury had been on a prior voir dire panel from which another jury had been selected to try other charges against the same defendant finding that the jurors were prejudiced by their exposure to the prior voir dire questions. *United States v. Gillis*, 942 F.2d 707, 710 (10th Cir. 1991). The court reasoned that "[p]otential jurors present at both voir dire examinations could easily have been influenced by the prior questioning such that they would not be 'willing to decide the case solely on the evidence before' them." *Id.* (quoting *Smith v. Phillips*, 455 U.S. 209, 217, 102 S.Ct. 940, 946 (1982)).

A split panel of the Tenth Circuit applied *Gillis* to a § 2254 challenge to a state court conviction, affirming the

district court's ordering of a new trial where a juror was "dishonest" in voir dire questioning, thus denying the defendant of "her right to a fair trial by an impartial jury." *Burton v. Johnson*, 948 F.2d 1150, 1159 (10th Cir. 1991). The dissent criticized the application of *Gillis*, arguing that the *Gillis* decision was "intertwined with federal supervisory standards and [did] not present pure constitutional analysis." *Id.* at 1161 (dissent).

While the Sixth Circuit has not directly addressed this issue, it has held that "a district court should not ordinarily inform the jury that indicted codefendants have already pleaded guilty and will not be proceeding to trial . . . 'The prejudice to the remaining parties who are charged with complicity in the acts of the self-confessed guilty participants is obvious." *United States v. Maliszewski*, 161 F.3d 992, 1004 (6th Cir. 1998). However, the *Maliszewski* Court concluded that the error in that case affected the defendant's substantive rights because the defendants had not pursued their request for a curative instruction. *Id.*

The Sixth Circuit has recognized that "the category of cases where prejudice has been presumed in the face of juror attestation to the contrary is extremely narrow." *DeLisle v. Rivers*, 161 F.3d 370 (6th Cir. 1998)(citing *Murphy v. Florida*, 421 U.S. 794, 798-89, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975)). The *DeLisle* addressed the potential taint of a jury based on pretrial publicity, and held that the "mere

prior knowledge of the existence of the case, or familiarity with the issues involved, or even some preexisting opinions as to the merits, does not in and of itself raise a presumption of jury taint." *Id.* at 382.

The Sixth Circuit has also addressed potential tainted juries in the context of inappropriate contact with jurors during the course of the trial. *United States v. Frost*, 125 F.3d 346 (6th Cir. 1997). The *Frost* Court held that the

> doctrine of presumed or implied, as opposed to actual, bias provides that, in certain 'extreme' or 'exceptional cases, courts should employ a conclusive presumption that a juror is biased . . . These extreme cases occur when a juror has a relationship in which the 'potential for substantial emotional involvement, adversely affecting impartiality,' is inherent."

Id. At 379 (internal citations omitted)).

The state courts did not address the substance of Petitioner's Sixth Amendment arguments because defendants did not preserve this issue at trial, and thus procedurally defaulted from raising the issue on appeal or collateral attack.

While the voir dire in this case discussed the pre-trial publicity at length, the questioning never directly addressed the effect of the prior trial on the willingness of the jurors to decide this case solely on the evidence in this case. The potential for jury bias in this case is much higher than in cases where mere pretrial publicity gives jurors preconceived notions about the evidence at trial. Int his case, seven jurors had previously determined beyond a reasonable doubt that Petitioner's co-escapees were guilty. The fact that seven jurors had already voted to convict under the same facts and circumstances rises to the level of presumed prejudice despite the jurors voir dire responses to the contrary. The Court finds the Petitioner's Sixth Amendment right to be tried by impartial and unbiased jurors was violated when seven of the jurors hearing his case had served on a jury which had convicted his co-escapees two months prior.

III. SIXTH AMENDMENT VIOLATION/ PROCEDURAL FAULT

Federal Courts may not reach merits of a constitutional claim that has been procedurally defaulted in state court without a showing of both cause and prejudice. *Payton v. Johnson*, 97 F.3d 1452 (6th Cir. 1996)(table)(1996 WL 549834)(citing *Reed v. Farley*, 512 U.S. 339, 354, 114 S.Ct. 2291, 2300 (1994)). Failure to preserve an objection at trial constitutes a procedural default. *Gilbert v. Park*, 763 F.2d

821 (6th Cir. 1985); *Hockenbury v. Sowders*, 620 F.2d 111 (6th Cir. 1980).

In this case, the Kentucky Court of Appeals and Kentucky Supreme Court did not address the substance of the biased jury issue because Petitioner had not preserved the issue with an objection at trial.

On direct appellate review, the Kentucky Supreme Court's only statement on this issue was "Appellants' other argument that they were prejudice because several jurors who sat in their case had previously sat in the case of another escapee is unpreserved and will not be reviewed." (State Record of Trial, TR 74).

On review of Petitioner's 11.42 motion to vacate, the Kentucky Court of Appeals states, in toto, "In addition to the foregoing specific allegations, appellants make an overriding contention that they were tried by a jury, seven jurors of whom had previously sat in judgment of a co-defendant charged with the same crime. The Supreme Court refused to address this argument of error for reason it was unpreserved." (State 11.42 Motion of Trial at 11.42 TR 18).

Petitioner successfully demonstrates cause for the procedural default this case by the claim of ineffective assistance of counsel. The attorney representing Petitioner

had represented the co-conspirator a few months prior. However, if the "cause" element is fulfilled by a claim of ineffective assistance of counsel, the analysis shifts to that claim, as set forth by the Supreme Court in *Strickland v. Washington*, 466 U.S. 648, 693-94, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984), and *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984).

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

It is well-established that petitioners stating a claim for ineffective assistance of counsel must demonstrate (1) counsel's representation fell below an objective standard of reasonableness; and (2) "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 648, 693-94, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984).

The Court finds the Petitioner's trial counsel fell below an objective standard of reasonableness. While counsel conducted a thorough voir dire regarding what the potential jurors knew of the case based on pre-trial publicity, the voir dire stopped short of revealing that several potential jurors had served on the jury of Petitioner's co-escapees a few months prior. Given that Petitioner's counsel represented the co-escapees in the earlier trial, he should have been

aware of the potential that some of the same jurors would be on Petitioner's voir dire panel.

The Supreme Court recognized an exception to the prejudice prong of the *Strickland* rule in *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). The *Cronic* Court recognized that "[t]here are . . . circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *Id.* at 658. The *Cronic* Court stated that the fundamental question "is whether the trial 'process [has lost] its character as a confrontation between adversaries." *Rickman v. Bell*, 131 F.3d 1150, 1155 (6th Cir. 1997)(quoting *Cronic* at 656-57).

The Sixth Circuit has held that *Cronic* is a "narrow exception" which "provides a reviewing court with some difficulty in application." *Rickman v. Bell*, 131 F.3d 1150, 1156 (6th Cir. 1997). The *Rickman* Court stated that a petitioner must demonstrate that counsel's performance was "so egregious as to amount to the virtual or constructive denial of the assistance of counsel" before the *Cronic* exception will apply. In *Rickman*, a split panel found such egregious performance in that case where counsel had taken the strategy of open hostility toward his own client and created a "loathsome image for [the defendant]--one that would make a juror feel compelled to rid the world of him."

The same panel that heard *Rickman* also split in a related case. *Groseclose v. Bell*, 130 F.3d 1161 (6th Cir. 1997). *Groseclose* and *Rickman* were tried together. Groseclose's trial counsel deferred to Rickman's trial counsel and presented no separate defense. The split panel held that it did not need to address the *Cronic* exception because "the prejudice resulting from [Groseclose's counsel] lawyering is so patent," thus constituting ineffective assistance of counsel under the *Strickland* analysis. *Id.* at 1170.

As discussed above, the Sixth Amendment right to be tried by impartial and unbiased jurors is clearly violated where seven of the jurors hearing his case had served on a jury which had already convicted a criminal defendant's co-conspirators. Petitioner's failure to receive a trial by an unbiased jury rises to the level of "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." Therefore, Petitioner need not demonstrate the prejudice prong of the *Strickland* analysis, and a conditional writ of habeas corpus is appropriate to address the violation of Petitioner's Sixth Amendment right.

Even without the application of the *Cronic* exception, the Court finds that Petitioner has demonstrated the necessary prejudice to satisfy the second prong of the *Strickland* analysis. A Kentucky state trial judge has the

discretion to reduce a sentence recommended by a jury, but cannot increase a jury sentence. *Dotson v. Commonwealth*, 740 S.W.2d 930, 931 (Ky., 1987). The seven juror's knowledge of the prior proceedings and sentencing create a reasonable probability that, but for the constitutional error, the result of the proceedings could have been different.

V. REMAINING CLAIMS

Petitioner objects to the Magistrate Judge's report, asserting that the seating of seven jurors from the previous trial was the result of prosecutorial misconduct, demonstrated the bias of the trial judge, and the totality of the circumstances warrant the dismissal of the indictment with prejudice as opposed to ordering a new trial. Petitioner offers no authority for his proposition that an absolute writ of habeas corpus is appropriate in this case, and a conditional writ of habeas corpus requiring a new trial is adequate to protect Petitioner's constitutional rights. See, e.g., *Evitts v. Lucey*, 469 U.S. 387, 389-90, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985).

Petitioner further asserts that he has a constitutional right to counsel for post-conviction proceedings. However, it is well established that there is no constitutional right to counsel in post-conviction proceedings. *Ritchie v. Eberhart*, 11 F.3d 587, 591-92 (6th Cir. 1993).

THEREFORE, IT IS ORDERED:

A **CONDITIONAL WRIT OF HABEAS CORPUS** is **HEREBY ISSUED**. The Commonwealth of Kentucky shall place this matter on the trial court's docket for retrial or a plea of guilty within sixty (60) days of the entry of this conditional writ. The petitioner's trial shall be commenced within ninety (90) days after being placed on the court's docket. In the event that the Commonwealth does not comply, an absolute writ of habeas corpus shall issue upon filing of an appropriate motion by the petitioner.

This is a final and appealable order. There is no just cause for delay.

This the 1 day of December, 1999.

s/ Thomas B. Russell

Thomas B. Russell, Judge
United States District Court

cc: counsel
Lyon Circuit Court
Petitioner

ENTERED:
December 2, 1999
Jeffrey Epperson, Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

DERRICK QUINTERO
Petitioner

v. No. 5:98CV-246-R

RICKY BELL, Warden
Respondent

ORDER

Upon review his report filed herein, the magistrate notes two errors which should be corrected in order that any ambiguity may be avoided. These corrections do not substantively affect the merits of the petitioner's claims, the respondent's defenses, or the magistrate judge's recommendations.

It is therefore **ORDERED** that page 11 of the magistrate judge's report filed on March 11, 1999, shall be amended as follows:

1. The final sentence of the quoted material found at the bottom of page is amended to read: "He pointed out

that counsel had represented the defendant in that trial."

2. The word "co-escapees" in the second line from the bottom of the page be changed to the singular "co-escapee."

DATE: March 15, 1999

s/ W. David King
W. David King
United States Magistrate Judge

ENTERED:
March 15, 1999
Jeffrey Epperson, Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

DERRICK QUINTERO,
Petitioner

v. No. 5:98CV-246-R

RICKY BELL, Warden
Respondent

MAGISTRATE JUDGE'S REPORT

This matter is before the Court on the motion of the respondent to dismiss the petition filed pursuant to 28 U.S.C. § 2254, or alternatively, for summary judgment (Docket Entry No. 15). The petitioner's response to the motion is at Docket Entry No. 18. This matter has been referred to the undersigned magistrate judge for report and recommendation pursuant to 28 U.S.C. § 636.

On June 16, 1988, the petitioner had two other inmates escaped from 3-Cellhouse at the Kentucky State Penitentiary in Eddyville, Kentucky ("KSP"). On July 10, 1988, they were apprehended in El Paso, Texas and were returned to Kentucky. On January 10, 1990, following a jury trial, the Lyon Circuit Court (Hon. Bill Cunningham)

entered final judgment convicting the petitioner of second-degree escape and the status offense of being a first-degree persistent felony offender ("PFO"). The petitioner was sentenced to twenty (20) years imprisonment, to run consecutively to the sentence he was serving at the time of his escape. On November 8, 1990, the Supreme Court of Kentucky affirmed the conviction on direct appeal. Five issues were raised by the petitioner in his appellate brief, and the Court addressed those five issues. A copy of the petitioner's brief is in the "Appendix" portion of the state court record appended to Docket Entry No. 15. A copy of the "not to be published" opinion of the Kentucky Supreme Court is in the "State Record of Trial" portion of the record.

On August 14, 1995, Judge Cunningham summarily denied the petitioner's motion to vacate, set aside, or correct sentence pursuant to Rule 11.42 of the Kentucky Rules of Criminal Procedure ("RCr 11.42"). A copy of the motion apparently is not in the state court record. On April 4, 1997, the Kentucky Court of Appeals affirmed the denial of the motion. The Court addressed six bases for the petitioner's allegation that his trial counsel was constitutionally ineffective, which presumably were raised before the trial court. These six grounds included the five grounds raised in the present petition in connection with the petitioner's second claim. The petitioner raised a "cumulative error" argument before the Court of Appeals that he has not raised in the present petition. On August

27, 1997, the petitioner's motion for discretionary review before the Kentucky Supreme Court was denied. Judge Cunningham's Order summarily denying the petitioner's RCr 11.42 motion is in the "State 11.42 Record of Trial" portion of the record, as are the petitioner's RCr 11.42 appellate brief and the "not to be published" opinion of the Court of Appeals.

Although the petitioner attempts to raise nine separately numbered claims in a repetitive and somewhat rambling twenty-seven page addendum to his petition (Docket Entry No. 1), the undersigned discerns that the petition presents the following constitutional issues:

> **Issue One:** The petitioner's petite jury was selected and impaneled contrary to the Sixth Amendment right to trial by an impartial jury due to the fact that seven members of his jury had previously sat as jurors in the trial of his co-escapees and had found the co-escapees to be guilty of escape, or at least, had made up their minds about the pivotal facts surrounding the escape.
>
> **Issue Two:** Trial counsel was constitutionally ineffective for not 1) objecting to an improperly selected and impaneled petite jury, 2) filing a motion for a change of venue, 3) securing the petitioner's presence during a pre-trial hearing on

whether the petitioner would appear before the jury in shackles, 4) filing a timely motion for a continuance due to lack of preparation, and 5) interviewing witnesses and potential witnesses prior to trial.

Issue Three: The petitioner was denied Due Process by the Circuit Court's refusal to appoint post-conviction counsel or to hold a hearing on the matter.

Issue Four: The petitioner was denied Due Process by prosecutorial misconduct.

Issue Five: The petitioner was denied Due Process by the Kentucky Supreme Court's reliance, on direct appeal, on an incomplete and inaccurate state court record.

Issue Six: The petitioner's post-conviction counsel, who represented him in the appeal of the Circuit Court's denial of the RCr 11.42 motion, was constitutionally ineffective.

Issue One: Preliminary Matters

On direct appeal of the petitioner's conviction, the Kentucky Supreme Court addressed the issue of what the

petitioner had been denied a fair and impartial jury as follows (p.3):

> Appellant's other argument that they were prejudiced because several jurors who sat in their case had previously sat in the case of another escapee is unpreserved and will not be reviewed.

The Court interpreted the petitioner's argument as being that he was "prejudiced" by the mentioned seven members of his jury. The petitioner's first numbered argument in his appellate brief before the Kentucky Supreme Court is that his "right to Due Process of law and a fair and impartial jury under the United States and Kentucky constitutions were denied when a tainted and prejudicial jury was allowed to decide the facts of the case" (*emphasis added*). The Supreme Court may have misinterpreted the petitioner's first argument because the argument as a whole, as briefed, reveals that the petitioner meant "a tainted and prejudiced jury" when he referred to a "prejudicial jury". As discussed infra, "prejudice" is not a necessary element of a constitutional claim based on a biased jury.

By all appearances, the Court declined to reach the merits of the petitioner's Sixth Amendment claim due to lack of preservation. However, a reasonable inference may be drawn that the Court did consider the merits of the

claim. Under Kentucky law, even constitutional error may be waived due to failure to preserve the error for appellate review by voicing a contemporaneous objection at trial. *West v. Commonwealth*, Ky., 780 S.W.2d 600 (1989). However RCr 10.26 states that:

> A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

Arguably, the Court did not consider the possibility of "palpable error" because it misinterpreted the petitioner's argument as requiring "prejudice" as an element of the constitutional claim, or it imposed the requirement itself based on a consideration of the merits of the claim.

The doctrine of "independent and adequate state grounds" was summarized in *Federal Criminal Practice: Federal Habeas Corpus*, Illinois Institute for Continuing Legal Education (June, 1997), Arleen Anderson, § 13.21 as follows:

> The doctrine of "independent and adequate state grounds" was traditionally applied by the United

States Supreme Court to bar direct review of a question of federal law decided by a state court on state law grounds. See, e.g., *Fox Film Corp. v. Muller*, 296 U.S. 207, 80 L.Ed. 158, 56 S.Ct. 183 (1935). The doctrine, however, also applies in deciding whether federal courts should address the claims of state prisoners in habeas corpus actions. Specifically, it applies to bar federal habeas review when a state court declined to address a prisoner's federal claims because the prisoner failed to meet a state procedural requirement or, in other words, committed a procedural default. See *Harris v. Reed*, 489 U.S. 255, 103 L.Ed.2d 308, 109 S.Ct. 1038 (1989). [The doctrine was applied earlier in a federal habeas corpus context in *Wainwright v. Sykes*, 433 U.S. 72 (1977).]

In *Harris*, the Supreme Court noted that the Illinois appellate court had made reference to the principal (*sic*) of Illinois law that claims raised in a post-conviction petition, such as the petitioner's ineffective assistance of counsel claim, which could have been presented on direct appeal but were not, are considered waived for purposes of appeal. 103 L.Ed.2d at 314. The Supreme Court further noted, however, that the Illinois court then went on to consider and reject the petitioner's federal claim on the merits. Id. The Court held that such a

procedural default does not bar habeas review unless the last state court rendering judgment in the case "clearly and expressly" stated that its judgment rests on a state procedural bar. 103 L.Ed.2d at 317.

Two years later in *Coleman v. Thompson*, 501 U.S. 722, 115 L.Ed.2d 640, 111 S.Ct. 2546 (1991), the Supreme Court clarified its ruling in *Harris*. Rejecting too broad a reading of *Harris*, the Court noted that although it encourages state courts to express plainly, in every decision potentially subject to federal review, the ground on which their judgment rest, it would not impose on state courts "the responsibility for using particular language in every case in which a state prisoner presents a federal claim". 115 L.Ed.2d at 662. The Court went on to conclude that the *Harris* rule applies only in cases in which it "fairly appears" that a state court judgment rested primarily on federal law or was interwoven with federal law. Id. In other words, if the federal court is unable to figure out what, if any, independent and adequate state law grounds the decision rests on, subsequent federal habeas review will probably not be barred.

The undersigned concludes that the Kentucky Supreme Court's refusal to consider the petitioner's "denial of an impartial jury" argument on lack of preservation grounds fairly appears to have been interwoven with its determination that the constitutional claim required prejudice as an element and, therefore, was without merit. Because the Kentucky Supreme Court arguably considered the merits of the constitutional claim, it may now be addressed by this federal habeas court.

Even if the Court rejects this conclusion and finds that the Kentucky Supreme Court relied on an adequate and independent state ground for not reaching the "biased jury" issue, the undersigned submits that the petitioner properly presented the issue to the state courts in connection with his RCr 11.42 motion. There is no requirement that a "biased jury" claim presented in a RCr 11.42 motion to be proven on the face of the trial record or that it be preserved for direct appellate review. RCr 11.42 provides for a hearing on any disputed factual issue that raises an issue of constitutional significance. The state court record submitted by the respondent (Docket Entry No. 15) apparently does not include a copy of the petitioner's RCr 11.42 motion filed in the Lyon Circuit Court. Nevertheless, the record adequately evidences that the petitioner did raise the "biased jury" claim in his motion and that he also requested a hearing on the matter, which was denied. The

Court of Appeals, in affirming Judge Cunningham's denial of the motion, acknowledged that the petitioner:

> . . . contend[s] that the circuit court erred in failing to hold a hearing on the allegations contained in [his] petition [] concerning ineffective assistance of counsel.
>
> In addition to the foregoing specific allegations [of ineffective assistance of counsel], [the petitioner] make[s] an overriding contention that they were tried by a jury, seven jurors of whom had previously sat in judgment of a co-defendant charged with the same crime. The Supreme Court refused to address this argument of error for reason it was unpreserved.

The undersigned concludes that the issue was presented to the Lyon Circuit Court and that the Court was obliged to address the issue and, if necessary, conduct a hearing but declined to do so because the petitioner's trial counsel could have preserved the issue for direct appeal but failed to do so. The issue was not addressed because a RCr 11.42 motion "is not an appropriate remedy simply for a frustrated appeal" (See Judge Cunningham's Order denying RCr 11.42 motion). The Court of Appeals, in affirming Judge Cunningham's denial, also declined to consider the issue observing the "The Supreme Court refused to address

this argument of error for reason it was unpreserved." The Court of Appeals went on to discuss the lack of any "prejudice" in the petitioner's case in a manner that suggested that it considered "prejudice" to be an element of a "biased jury" claim.

Preservation of constitutional error at trial for direct appellate review is not a requirement for establishing that error in a post-conviction RCr 11.42 context. In any event, it is immaterial whether the Court of Appeals actually addressed the constitutional issue for purposes of the "exhaustion of state court remedies" doctrine. The controlling issue is whether that issue was presented. As stated in *Castille v. Peoples*, 489 U.S. 346, 350-351 (1989) (*internal citations and quotations omitted*):

> It is too obvious to merit extended discussion that whether the exhaustion requirement of 28 U.S.C. § 2254(b) has been satisfied cannot turn upon whether a state appellate court chooses to ignore in its opinion a federal constitutional claim squarely raised in petitioner's brief in the state court. . . .[O]nce a federal claim has been fairly presented to the state courts, the exhaustion requirement is satisfied.

As discussed above, the record adequately establishes that the petitioner did present the issue in his RCr 11.42 motion.

Therefore, the petitioner's first claim may be addressed by this Court without offending principles of comity and federalism.

"Special Circumstances" Excusing Exhaustion

The doctrine of "exhaustion of state court remedies," though routinely followed by federal habeas courts, is not jurisdictional in nature, and a petitioner's failure to exhaust his state court remedies does not take away the Court's power to hear a petitioner's federal claims. *Granberry v. Greer*, 481 U.S. 129, 131 (1987). Federal courts may grant habeas relief even absent exhaustion if special circumstances are present as set forth in 28 U.S.C. § 2254(b), to-wit:

> . . . there is either an absence of available state corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the petitioner.

In *Herbert v. Billy*, 160 F.3d 1131, 1134 n.3 (6th Cir., 1999), the Court recently excused the exhaustion requirement where seeking a state court remedy would have been futile. See also *Matlock v. Rose*, 731 F.2d 1236 (6th Cir., 1984) (futility exception controlled when state court clearly would not adjudicate petitioner's insanity defense claim).

In this case, the refusal of the state courts to consider the petitioner's first claim in his RCr 11.42 motion due to failure to preserve the error on direct appeal demonstrated the futility of seeking a state post-conviction remedy. The Court may be convinced that "special circumstances" apply in this case excusing the exhaustion requirement. The decision is a factual one for the Court to make subject to a "clearly erroneous" standard of review. See *Mellott v. Puckett*, 63 F.3d 781, 784 (8th Cir., 1995).

Issue One: Merits

The petitioner's first claim is that his Sixth Amendment right to a fair, impartial, and unbiased jury was violated by virtue of the presence of seven jurors who had already made up their minds with respect to the facts surrounding the escape for which he was tried. In its brief on direct appeal, the Commonwealth admitted that seven jurors sat on both cases and named those jurors (p. 3). Contrary to the legal analysis provided by the state courts, there is no requirement that, in addition to bias, the petitioner must show that the bias was prejudicial and the error was not harmless.

The United States Supreme Court has divided constitutional errors affecting convictions into two broad categories: trial errors and structural errors. Structural errors are those that affect "the framework within which

the trial proceeds." *Arizona v. Fuliminate*, 499 U.S. 279, 309 (1991). They are "structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless error' standards." Id. They affect the trial from beginning to end. Trial errors, on the other hand, are generally errors that occur during the presentation of the case to the jury, and that may therefore be quantitatively assessed in the context of other evidence presented." Id. at pp. 307-308. Trial errors are subject to harmless error analysis, but structural errors are not.

In *Sullivan v. Louisiana*, 508 U.S. 275 (1993), the Court held that a jury instruction that erroneously defined the reasonable doubt standard effectively deprived the defendant of his right to a jury trial. The Court first distinguished "structural defects in the constitution of the trial mechanism" from "errors which occur during the presentation of the case to the jury." Id. at p. 282. It held that an erroneous doubt instruction constitutes structural error because (Id.) (*internal citations and quotations omitted)*:

> . . . the jury guarantee [is] a basic protection whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function. The right to trial by jury reflects, we have said, a profound judgment about the way in which law should be enforced and justice

> administered. The deprivation of that right, with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as structural error.

It is hard to imagine an error more starkly structural than an error implicating the very design of the jury mechanism. When, as here, the trial judge impanels a biased jury, he commits an error of this type. The consequences of such an error are "necessarily unquantifiable and indeterminate." Moreover, they constitute an error in the "constitution of the trial mechanism" that affects "the framework within which the trial proceeds." The undersigned concludes that an error in the fundamental design of the jury mechanism "unquestionably qualifies as structural error." The Supreme Court has found structural errors in other circumstances. See, for example, *Tumey v. Ohio*, 273 U.S. 510 (1927)(denial of right to impartial trial judge); *Gideon v. Wainwright*, 372 U.S. 335 (1963)(denial of right to trial counsel); *McKaskle v. Wiggins*, 465 U.S. 168 (1984)(denial of right to self-representation); *Waller v. Georgia*, 467 U.S. 39 (1984)(denial of right to public trial); and *Vasquez v. Hillery*, 474 U.S. 254 (1986)(unlawful exclusion of grand jurors of defendant's race). The petitioner's first claim has merit.

The impact of the AEDPA on the Court's consideration of the merits of the petitioner's first claim

In *Herbert v. Billy*, 160 F.3d 1131 (6th Cir., 1999), the Sixth Circuit recently announced, in light of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), that federal habeas courts shall not find that a constitutional error has occurred if the state courts found no such error and the state court decisions are not contrary to, nor an unreasonable application of, clearly established constitutional law as articulated by the United States Supreme Court. The primary effect of the new standard is that habeas courts may no longer utilize lower federal court precedent in finding the existence of a constitutional error. The new standard should have no impact in this case because, to the extent the state courts found no constitutional error, this conclusion was contrary to clearly established Supreme Court law. As discussed above, the Supreme Court has long acknowledged a fundamental right to an impartial jury and that this right reflects "a profound judgment about the way in which law should be enforced and justice administered." *Sullivan*, supra, at p. 282. As the petitioner eloquently argued in his motion for discretionary review before the Kentucky Supreme Court:

> . . .it is the good name of the jury system that is at stake in the instant case, not merely the rights of

> the accused. The Court of Appeals' opinion indicates that there was error, that counsel was ineffective, that contrary to law, [the petitioner] was tried by an improperly constituted jury, but that none of this makes any difference because [the petitioner] was guilty.
>
> [The petitioner] argues that it does make a difference, not only to [the petitioner], but to every citizen — to the jury system [] itself.
>
> This Court should grant [the petitioner's] motion for review, not only to protect the rights of individual citizens but to protect all of the citizens of the Commonwealth who depend on this system to mete out justice, not just to put "criminals" away.

The impact of the new "harmless error" test on the petitioner's first claim

A federal habeas court must always consider the possibility of harmless error, even after it has concluded that a constitutional error occurred. The Court announced a less petitioner-favorable standard of "harmless error" in *Brecht v. Abrahamson*, 507 U.S. 619 (1993). However, *Brecht* and its progeny should have not effect on the present case because it is settled that structural errors are not

subject to harmless error review even on federal habeas review of state convictions. Id. at p. 629. If a structural error occurs at trial, a reviewing court does not conduct a harmless error analysis. Nor does it look for a specific showing of prejudice. On the contrary, "[t]he existence of such defects . . . requires automatic reversal of the conviction because they infect the entire trial process." Id. at pp. 629-630. The petitioner's first claim has merit and requires that his conviction be set aside.

Issue Two, Sub-Issue One: Merits

The petitioner claims that his trial counsel was constitutionally ineffective for not objecting to the selection and impanelment of his petite jury because seven of the twelve jurors had sat previously in a separate trial of some of the petitioner's co-escapees. The respondent admits that this ineffectiveness claim has been presented to the state courts and that it is not now procedurally barred (Docket Entry No. 15. p. 4). The petitioner further argues that counsel was in a position to know of and object to the presence of these jurors. According to the petitioner's appellate brief in connection with the denial of his RCr 11.42 motion (p.2):

> In the [petitioner's RCr 11.42] motion [the petitioner] alleged that trial counsel had failed to challenge seven jurors who had sat at a previous

> trial involving the same crime. He pointed out that counsel had represented the [petitioner] in that trial.

The seven jurors apparently had previously found the petitioner's co-escapees to be guilty of escape, or at least, had made up their minds about the pivotal facts surrounding the escape. Therefore, the jury was biased (Issue One).

In *United States v. Cronic*, 466 U.S. 648, 658 (1984), the Court held, with respect to ineffective assistance of counsel claims, that there are "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." In such circumstances, constitutional ineffectiveness is presumed. The Court described two situations in which a presumption of a Sixth Amendment violation would be justified. The most obvious situation is where there is a complete denial of counsel because "counsel was either totally absent or prevented from assisting the accused during a critical stage of the proceeding." Id. at pp. 659-666. Second, there are "occasions when, although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial". Id. Only if the presumption of a Sixth Amendment violation

does not apply does the two-part test for evaluating claims of ineffective assistance of counsel set forth in *Strickland v. Washington*, 466 U.S. 668 (1984) apply.

The selection and impanelment of a biased jury in this case constituted an occasion in which even a fully competent counsel would have had difficulty in providing effective assistance. Therefore, a presumption of prejudice is appropriate in this case. Even if the Court concludes that the petitioner has committed a procedural default barring consideration of his first claim, the failure of trial counsel to preserve this issue for review by the state courts constituted ineffective assistance of counsel warranting a retrial.

If Issue Two, Sub-Issue One has merit, there is "cause" excusing any procedural default barring considering of Issue One

Another implication of a finding by the Court that the petitioner's counsel was constitutionally ineffective for not raising the "biased jury" issue is that this ineffectiveness constituted "cause" excusing any procedural default with respect to the underlying constitutional claim (Issue One). A federal habeas court may not reach the merits of claims that have been procedurally defaulted in state courts absent a showing of "cause" for such default. If a state prisoner has failed to comply with an independent and adequate state procedural rule, thus causing him to default, there

must generally be a showing of "cause" excusing such default and "actual prejudice" resulting therefrom. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). Ineffective assistance of trial counsel rising to the level of a Sixth Amendment denial of counsel may be "cause" as contemplated by *Coleman*. Id. at pp. 753-754.

"Prejudice" has never been equated with a showing of actual innocence, although a showing of actual innocence or a fundamental miscarriage of justice may excuse the need for a federal habeas court to apply the "cause and prejudice" test prior to consideration of the merits of a constitutional claim. *Murray v. Carrier*, 477 U.S. 478, 495-496 (1986). On the contrary, "a showing of a pervasive actual prejudice can hardly be thought to constitute anything other than a showing that the prisoner was denied 'fundamental fairness' at trial." Id. at p. 494. The "prejudice" component of the "cause and prejudice" test is obviated in cases involving a structural defect because the prejudice is presumed. In *Dorman v. Wainwright*, 798 F.2d 1358, 1370 (11th Cir., 1986), the Court held that:

> . . . given the nature of the constitutional right at issue here [denial of the right to self-representation], we are compelled to find inherent prejudice in the denial of the right. The Supreme Court has held that the denial of the right to proceed pro se is not amendable to harmless error

> analysis. . . . If the deprivation of this right cannot be harmless it must, by definition, be prejudicial.

Similarly, in *Alcorn v. Smith*, 781 F.2d 58, 62 (6th Cir., 1986), the Sixth Circuit held that:

> The right at issue in this case is a fundamental one — the right not to be convicted unless guilt is proved by sufficient evidence. The district court must therefore determine, after a full and fair hearing, whether such a basic right is entitled to a more moderate calculation of cause and prejudice and whether the state presents sufficient interests in finality to justify its strong limitations on a review of that right.

The undersigned concludes that, if it was constitutionally ineffective for counsel not to have preserved Claim One for direct appellate review, then sufficient "cause and prejudice" has been established to excuse the procedural default and for this Court to consider the merits of Claim One due to the structural nature of the error.

Issue Two, Sub-Issues Two through Four: Preliminary Matters

Of the five alleged shortcomings of trial counsel supporting the petitioner's ineffectiveness claim, the

respondent contends that only the first has been properly presented to the state courts and is not now procedurally barred "because only one issue was presented in [the petitioner's] Motion for Discretionary Review in the Kentucky Supreme Court" (Docket Entry No. 15, p. 4). The Sixth Circuit requires that all claims that are brought in a RCr 11.42 motion be appealed all the way to the state supreme court by way of a motion for discretionary review in order to satisfy the "exhaustion of state court remedies" requirement. *Silverburg v. Evitts*, 993 F.2d 124 (6th Cir., 1993). But see "Requiring Unwanted Habeas Corpus Petitions to State Supreme Courts for Exhaustion Purposes: Too Exhausting," Matthew Anderson, 79 Minnesota Law Review 1197 (1995)(in which *Silverburg v. Evitts* is criticized and found to be contrary to the general rule that the exhaustion doctrine requires only that all appeals "as of right" within the state courts be utilized).

In any event, the petitioner's motion for discretionary review, which was prepared by appointed counsel, is in the "State 11.42 Record of Trial" portion of the state court record appended to Docket Entry No. 15. The motion plainly "moves this [Kentucky Supreme] Court to grant discretionary review of the decision of the Court of Appeals of Kentucky" affirming the trial court's denial of the RCr 11.42 motion. The motion contemplated review of the entire decision of the Kentucky Court of Appeals. Furthermore, a fair reading of the memorandum supporting the motion

reveals that counsel discussed the "biased jury" issue in greater detail than the other issues because only it appeared to raise "special reasons" as required by Kentucky Rule of Civil Procedure ("CR") 76.20(1) for the granting of discretionary review. Those "special reasons" included an argument, which the undersigned has herein found to be valid, that the state high court should redefine the "prejudice" component of the "ineffective assistance of counsel" test announced in *Strickland v. Washington*, supra, in "cases involving irregularities in the jury." According to the "special reasons" argument advanced in the motion, in such cases, "it is the good name of the jury system that is at stake. . ., not merely the rights of the accused." There is no language in the motion for discretionary review suggesting that the petitioner wished to abandon the other "non-special" grounds supporting his ineffectiveness claim.

Even if the Court finds that sub-issues two through five of Issue Two were not raised in the motion for discretionary review as required by *Silverburg*, supra, the undersigned submits that the exhaustion requirement should be waived in this circumstances because it would have been futile to attempt to raise those issues in a motion for discretionary review. See *Herbert v. Billy* and *Matlock v. Rose*, supra (both Sixth Circuit cases). The undersigned concludes, contrary to the respondent's position, that grounds two through five supporting the petitioner's ineffectiveness

claim have been properly presented to the state courts, and they have not been procedurally defaulted.

Issue Two, Sub-Issues Two through Four: Merits

Sub-issues two through four do not implicate structural errors. They are ordinary trial errors, in order for a reviewing court to find constitutional ineffective assistance of counsel, the claimant must demonstrate that counsel's performance was deficient and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, supra at p. 694. In this case, the jury was presented with sufficient evidence to conclude that the petitioner escaped from KSP. The petitioner's sole possible defense at trial was an affirmative defense of "fear of imminent injury" or "choice of evils", due to adverse conditions he was living in at the time of his escape. The trial judge denied this defense, and no instruction concerning "choice of evils" was given to the jury. The trial judge's denial of the defense is at pages 116 through 117 of "State Transcript of Evidence" appended to Docket Entry No. 15. The petitioner has not challenged the constitutionality of the trial judge's denial of the instruction. Because the jury was not given a "choice of evils" instruction and in light of the uncontradicted evidence of escape presented at trial, no reasonable jury could have acquitted the petitioner. Therefore, the four

alleged instances of ineffective assistance of counsel advanced in the present petition (sub-issues two through five) do not constitute ineffectiveness as defined by the second prong of the *Strickland* test. These issues are without merit.

Issue Three

In light of the serious allegations of the petitioner that his jury was biased and that his trial counsel was ineffective for not objecting to this bias, which was known to counsel, the trial court should have held a hearing on the petitioner's RCr 11.42 motion alleging such bias and ineffectiveness. It was arguably a Due Process violation to deny a hearing in such circumstances.

Issue Four

The petitioner has procedurally defaulted on his allegation that he was denied a fair trial due to prosecutorial misconduct. The issue has never been presented to any state court, and it is too late to attempt to raise the issue in a subsequent RCr 11.42 motion. See RCr 11.42(3)("Final disposition of the motion shall conclude all issues that could reasonably have been presented in the same proceeding"). A federal habeas court may not reach the merits of a claim that is first presented in a habeas corpus petition unless the petitioner can show "cause and

prejudice" for not presenting the issue earlier in the state courts or "actual innocence". See *Payton v. Johnson*, 97 F.3d 1452 (6th Cir. 1996) and *Coleman v. Thompson*, supra. There has been no such showing, and such a showing appears to be impossible in light of the fact that the issue could have been raised in the petitioner's RCr 11.42 motion. There is no right to counsel, effective or otherwise, in connection with seeking post-conviction relief. A claim of ineffective assistance of counsel in a state post-conviction proceeding can never establish "cause" because there is no constitutional right to counsel in such proceedings. *Ritchie v. Eberhart*, 11 F.3d 587, 591-592 (6th Cir. 1993).

Issue Five

The petitioner's fourth argument is procedurally barred for the same reasons discussed in connection with Issue Three.

Issue Six

The petitioner contends that his post-conviction counsel, who represented him in the appeal of the Circuit Court's denial of his RCr 11.42 motion, was constitutionally ineffective. The argument is without merit because there is no right to post-conviction counsel, effective or otherwise. *Ritchie*, supra.

RECOMMENDATION

Based upon the foregoing, the magistrate judge RECOMMENDS that the motion of the respondent to dismiss the petition filed pursuant to 28 U.S.C. § 2254, or alternatively, for summary judgment (Docket Entry No. 15) be DENIED. The magistrate judge further RECOMMENDS that the petition for writ of habeas corpus be GRANTED and that a conditional writ of habeas corpus be issued. As a condition of the writ, the Commonwealth of Kentucky shall place this matter on the trial court's docket for retrial or a plea of guilty within sixty (60) days of the granting of the conditional writ. The petitioner's trial shall be commenced within ninety (90) days after being placed on the court's docket. The writ should further provide that, in the event the Commonwealth of Kentucky does not comply with the conditional writ in a timely manner, an absolute writ of habeas corpus shall issue upon the filing of an appropriate motion by the petitioner.

DATE: March 10, 1999

s/ W. David King
W. DAVID KING
United States Magistrate Judge

NOTICE

Pursuant to 28 U.S.C. § 636 Fed.R.Civ.P.6(e), the parties shall have thirteen (13) days from the date of service to file written objections to the foregoing report with the Clerk of Court. A copy of the objections shall be served on the undersigned at P.O. Box 826, Paducah, Kentucky, 42002-0826. Failure of a party to file timely objections shall constitute a waiver of the right to appeal by that party. *Thomas v. Arn*, 474 U.S. 140, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985).

DATE OF SERVICE: 3-11-99

s/ W. David King
W. DAVID KING
United States Magistrate Judge

SUPREME COURT OF KENTUCKY
97-SC-337-D
(95-CA-2817 - 2818-MR)

DERRICK QUINTERO
MOVANTS
AND JAMES BLANTON

V. **LYON CIRCUIT COURT**
88-CR-72-1 & 2

COMMONWEALTH OF KENTUCKY **RESPONDENT**

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

ENTERED August 27, 1997.

s/ Robert F. Stephens
Chief Justice

RENDERED: APRIL 4, 1997; 2:00 p.m.
NOT TO BE PUBLISHED

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
NO. 95-CA-2817-MR

DERRICK QUINTERO **APPELLANT**

APPEAL FROM LYON CIRCUIT COURT
v. HONORABLE BILL CUNNINGHAM, JUDGE
ACTION NO. 88-CR-072-1

COMMONWEALTH OF KENTUCKY **APPELLEE**

and:

95-CA-2818-MR

JAMES BLANTON
APPELLANT

APPEAL FROM LYON CIRCUIT COURT
v. HONORABLE BILL CUNNINGHAM, JUDGE
ACTION NO. 88-CR-072-2

COMMONWEALTH OF KENTUCKY **APPELLEE**

OPINION
AFFIRMING

*** *** *** ***

BEFORE: WILHOIT, CHIEF JUDGE; GUIDUGLI and MILLER, Judges.

MILLER, JUDGE: Derrick Quintero and James Blanton bring these appeals from orders of the Lyon Circuit Court entered August 16, 1995. We affirm.

Appellants escaped from the Kentucky State Penitentiary at Eddyville on June 16, 1988. Apprehended in El Paso, Texas, on July 10, 1988, they were returned to Kentucky and indicted by the Lyon County Grand Jury for the offense of escape in the second degree (Ky. Rev. Stat. (KRS) 520.030). They were also charged as being persistent felony offenders (PFO) in the first degree (KRS 532.080(3). Upon conviction, appeals were taken to the Supreme Court, wherein the matter was affirmed in unpublished opinions dated November 8, 1990 (No. 90-SC-089-MR and 90-SC-091-MR). Subsequently, appellants filed for Ky. R. Crim. P. (RCr) 11.42 relief. That relief having been denied, we consider these appeals.

Appellants respectively contend that the circuit court erred in failing to hold a hearing on the allegations contained in their petitions concerning ineffective

assistance of counsel. Specifically, appellants allege ineffective assistance in that (1) counsel had failed to move for a change of venue following extensive publicity in the county of trial; (2) counsel had failed to interview or obtain statements from Commonwealth and defense witnesses; (3) counsel failed to assert proper grounds for a continuance; (4) counsel failed to investigate the case in general; (5) a substitute counsel, who appeared at the sentencing, was unprepared and failed to interview appellants; and (6) the accumulation of errors.

In addition to the foregoing specific allegations, appellants make an overriding contention that they were tried by a jury, seven jurors of whom had previously sat in judgment of a co-defendant charged with the same crime. The Supreme Court refused to address this argument of error for reason it was unpreserved.

Our consideration of allegations pertaining to inadequate assistance of counsel is founded upon whether appellants can satisfy the two-prong test set out in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); accord, Gall v. Commonwealth, Ky., 702 S.W.2d 37 (1985), cert. denied, 478 U.S. 1010, 106 S.Ct. 3311, 92 L.Ed.2d 724 (1986). They must first demonstrate that counsel's performance was deficient and, second, that the deficiency resulted in actual prejudice to them. Id.

Our Supreme Court has dealt with the standard set forth in Strickland in the case of McQueen v. Commonwealth, Ky., 721 S.W.2d 694 (1987). Therein, the rule was laid down that the ineffectiveness of counsel is insufficient to cause a reversal unless there is "reasonable possibility that, but for counsel's
unprofessional errors, the result of the trial would have been different." Id. at 697.

We have examined the claims of error asserted by appellants herein. In view of the nature of the charge — escape — and the evidence sustaining same, we are not of the opinion that the appellant's allegations, if proved, would have caused a different result in their trial within the parameters of McQueen, supra. The appellants admitted their escape from the penal institution. Their only defense was "choice of evils". The trial court rejected this defense, being of the opinion there was insufficient evidence of a specific and immediate threat of injury to their persons. On appeal, the Supreme Court affirmed. We are not directed to any specific evidence which counsel might have discovered to support the choice of evils defense. On the whole of the case, we think a hearing upon the allegations of ineffective assistance of counsel was not mandated by RCr 11.42.

For the foregoing reasons, the judgments of the circuit court are affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT: BRIEF FOR APPELLEES:

Elizabeth Shaw
Richmond, KY

A. B. Chandler III
Attorney General

Rickie L. Pearson
Assistant Attorney General
Frankfort, KY

RENDERED: November 8, 1990
NOT TO BE PUBLISHED

Supreme Court of Kentucky

No. 90-SC-089-MR

DEREK QUINTERO
APPELLANT

ON APPEAL FROM LYON CIRCUIT COURT
v. HON. WILLARD B. PAXTON, JUDGE
No. 88-CR-072

COMMONWEALTH OF KENTUCKY APPELLEE

AFFIRMING

AND:

No. 90-SC-091-MR

JAMES BLANTON APPELLANT

ON APPEAL FROM LYON CIRCUIT COURT
v. HON. WILLARD B. PAXTON, JUDGE
No. 88-CR-072

COMMONWEALTH OF KENTUCKY APPELLEE

AFFIRMING

MEMORANDUM OPINION OF THE COURT

Appellants were inmates at the Kentucky State Penitentiary in Eddyville, Kentucky, when, on June 16, 1988, they and several other inmates escaped. Approximately one month later they were apprehended in Texas and returned to Kentucky for trial. After a jury trial, each was convicted of second-degree escape and of being a first-degree PFO. Each was sentenced to 20 years in prison. They appeal as a matter of right.

First, appellants argue that they were denied a fair and impartial jury because they were not given the opportunity to conduct individual voir dire regarding the prospective jurors' knowledge of other crimes committed by appellants and their co-escapees. In response to a question by appellants regarding whether any of the prospective jurors had "information about any other crimes that might have been committed by Mr. Quintero or Mr. Blanton that aren't related to this matter," one juror responded, "I watch television. I heard about the Tennessee incident, yes."

After this, appellants requested a mistrial, arguing that the jury panel was tainted by this response. The mistrial was not granted, but four jurors who had heard about the incident and said they could not be impartial were excused

for cause. The remaining four jurors who had heard about other crimes said they could be impartial, but were nonetheless not seated.

Later, in response to appellants' question about whether any of his relatives had anything happen to them as a result of the escape, another prospective juror disclosed that his mother's house had been broken into by some other escapees. He maintained that would not affect his decision about appellants; furthermore, he did not serve on the jury. In fact, none of the 12 jurors who sat on the case was challenged for cause at any time, and defense counsel acknowledged at the end of the selection process that he was satisfied with the jury. Under these circumstances, appellants have failed to show that such comments as were heard by the jurors who sat were so prejudicial as to require a reversal.

Appellants' other argument that they were prejudiced because several jurors who sat in their case had previously sat in the case of another escapee is unpreserved and will not be reviewed.

Appellants' second argument is that because they were required to wear shackles at trial they were unfairly prejudiced. The trial court conducted a hearing on the matter and heard testimony regarding their involvement in a serious assault of another inmate; their escape from a

maximum security unit; information received by the warden that they would attempt to escape at trial; and the fact that they posed at threat to individuals in the courtroom. In the case of Quintero, the fact that he had also made two prior escapes from the Caldwell County Jail and had taken hostages was before the court.

Because good cause was shown, the trial court did not abuse its discretion in this matter. RCr 8.28(5); Loux v. U.S., 389 F.2d 911 (9th Cir. 1968), cert. denied, 393 U.S. 867, 89 S.Ct. 151, 21 L.Ed.2d 135 (1968). Furthermore, there was no prejudice because the charge was escape and because appellants admitted escaping. Therefore, it was obvious to the jury that appellants had previously been convicted of a crime and had also committed the crime for which they were presently being tried.

Appellants next argue that they were wrongfully denied the opportunity to present proof to justify an instruction on the "choice of evils" defense set forth in KRS 503.030. This defense requires that the defendant's conduct be necessitated by a specific and immediate threat of injury to his person. Here, to support the defense, appellants sought to use, in addition to their own testimony, that of two witnesses familiar with the prison.

The trial court, after listening to their offer of proof, refused to admit the testimony unless appellants could

make some offer to show a threat close in time to the escape. Because no such testimony was available, the witnesses did not testify. Absent any proof, either in appellants' testimony or in the proffered testimony, that escape was necessary to protect appellants from an imminent threat of injury under circumstances which left them with no reasonable and viable alternative other than escape, the instruction was properly denied. See Senay v. Commonwealth, Ky., 650 S.W.2d 259 (1983).

Appellants' cumulative error argument is without merit. Both testified about threats they had received so the jury was aware of that fact. The offer of proof made during the case in chief revealed that the two victims who were not allowed to testify either in chief or during truth-in-sentencing would have given evidence no more than cumulative of that given by appellants. There would have been no evidence of any additional threats or threats imminent at the time of escape. Under these circumstances, the trial court did not err in refusing to admit the evidence.

For these reasons, the judgment of conviction of the Lyon Circuit Court is hereby affirmed.

All concur except Leibson, J., who dissents and states as follows: The jury selection process was totally inadequate. It deprived the appellant of fair use of

peremptory challenges, and it failed the constitutional minimums set in Irvin v. Dowd, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961).

ATTORNEYS FOR APPELLANTS:
Richard C. Gibson
Appellate Public Advocate
1916 Kentucky Home Life Building
Louisville, Kentucky 40202

ATTORNEY FOR APPELLEE:

Frederic J. Cowan
Attorney General
Capitol Building

Assistant Attorney General
Rickie L. Pearson